No. 93-44

Supreme Court, U.S.
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Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF OF APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.* IN OPPOSITION TO MOTIONS TO AFFIRM

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TABLE OF AUTHORITIES

CASES — *Page*

Buckley v. Valeo, 424 U.S. 1 (1976) 3-4
Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) 2, 7
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993) 4-5
Meyer v. Grant, 486 U.S. 414 (1988) 4
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 4
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 5
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986) 2, 6, 7
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 7
Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988) 4
United States v. O'Brien, 391 U.S. 367 (1968) 3, 6
Ward v. Rock Against Racism, 491 U.S. 78 (1989) 6

STATUTES

Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 4 and 5 (codified at 47 U.S.C. §§ 534, 535) .....*passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 628, 102 Cong., 2d Sess. (1992) 4
S. Rep. 92, 102 Cong., 1st Sess. (1991) 4

AGENCY MATERIALS

Inquiry Into Economic Relationship Between Television Broadcasting and Cable Television, 71 FCC2d 632 (1979) 6

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Pursuant to Rule 18.8 of the Rules of this Court, appellants Turner Broadcasting System, Inc, *et al.*[1] submit this brief in opposition to the motions to affirm filed by the government ("Govt. Motion"), appellee National Association of Broadcasters ("NAB Motion"), appellee Association of Independent Television Stations, Inc. ("INTV Motion"), and appellees Association of America's Public Television Stations, Public Broadcasting Serv-

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[1] Appellants joining this motion are Turner Broadcasting System, Inc., Arts & Entertainment Network, Black Entertainment Television, Inc., E! Entertainment Television, Inc., Hearst/ABC-Viacom Entertainment Services, International Family Entertainment, Inc., National Cable Satellite Corporation, QVC Network, Inc., The Travel Channel, Inc., and USA Networks, all parties in Docket No. 92-2247 below; and Discovery Communications, Inc. and The Learning Channel, Inc., parties in Docket No. 92-2258 below.

ice and Corporation for Public Broadcasting ("PBS Motion"). For the reasons set forth below and in appellants' jurisdictional statement, the Court should deny appellees' motions, note probable jurisdiction, and order full briefing and oral argument on the merits. The constitutional questions are substantial, the divided district court is wrong, and full review by this Court is appropriate and necessary.

We concur in the arguments made in the reply brief filed by the other appellants. We highlight in this brief the constitutional infirmities, from the particular standpoint of cable programmers, of the so-called must carry provisions contained in sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), 47 U.S.C. §§ 534, 535. Under the must carry provisions, the government has dictated that local broadcast stations are guaranteed access to viewers through cable carriage at the expense of competing speakers—cable programmers. The motions to affirm, particularly the government's, gloss over or ignore this infringement of cable programmers' First Amendment rights.

1. As the dissent recognized, consistent with the conclusion of the United States Court of Appeals for the District of Columbia Circuit invalidating previous must carry regulations,[2] the must carry statute unconstitutionally infringes upon rights of cable programmers by dictating that broadcasters be given preferred positions in the marketplace of speech at the programmers' expense. As Judge Williams noted, "[g]iven the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down" (J.S. App. 55a, footnote omitted). As this

[2] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1451-52 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986). *See also Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

Court has long held, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

The First Amendment violation of which the cable programmers complain is not the invasion of their editorial discretion or of their right to remain silent. Quite the contrary, it is the governmental invasion of their right to speak on equal terms with other speakers. From the programmers' point of view, the central vice of the must carry law is its speaker-partiality—its enactment of an explicit preference for one group of speakers (local broadcasters) at the direct expense of cable programmers in the marketplace of ideas. This government invasion is particularly harmful because cable programmers, like local broadcasters, must compete for a limited number of channels on a cable operator's system. However, unlike broadcasters, programmers have no governmentally-conferred access to the airwaves and thus no alternative means of disseminating their messages to the public.

Contrary to the district court's view, *Buckley* requires that this government interference in the marketplace of speech be subjected to exacting scrutiny.[3] Other decisions

[3] In *Buckley*, the expenditure limitations restricting the speech of some in order to give others better access to public audiences were subject to exacting scrutiny—and struck down—even though the restrictions were "neutral as to the ideas expressed." 424 U.S. at 39. And in so doing, the Court specifically reversed the court of appeals' conclusion that the *O'Brien* standard (*United States v. O'Brien*, 391 U.S. 367 (1968)) applied. 424 U.S. at 15-17. Appellees' attempts to distinguish *Buckley* are unavailing. (Govt. Motion at 27 n.23; NAB Motion at 21-22.) First of all, *Buckley* demonstrates that appellees' assertion that exacting scrutiny never applies unless the government seeks to suppress particular "ideas" or "viewpoints" is simply wrong. Exacting scrutiny applied in *Buckley* because the government purposefully sought to regulate protected expression. The Court did not suggest that the *O'Brien* test would have applied if the

of this Court make clear that government regulations, like the one here, aimed at protected expression itself are subject to the most rigorous First Amendment scrutiny.[4]

The district court's refusal to test the statute under exacting scrutiny seemingly reflects its belief that the law is not content-based. While the government and other appellees ask the Court to embrace the congressional findings in the 1992 Cable Act, they ignore those congressional findings that expose the content-based nature of Congress' justification for must carry. Congress granted local broadcast stations a governmental preference ahead of all cable programmers because of its belief that the former present "local news and public affairs programming and other local broadcast services critical to an informed electorate."[5] Thus, as Judge Williams' dissent recognized, Congress acted to promote local broadcasters' speech, at the expense of cable programmers, because it found the content of broadcasters' speech to be "especially worthy."[6] Indeed, because broadcasters' program-

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expression at issue had been "protected" but not "political" and, in any event, much of the speech that cable programmers offer (*e.g.*, CNN, C-SPAN and others) includes core "political" speech. Further, the Court's opinion in *Buckley* emphasized that the limitations at issue there, like the must carry provisions, could not be characterized as regulations of "conduct" which only "incidentally affected speech", *and* that the governmental interests asserted—promoting the speech of some by limiting the First Amendment rights of others—could not be deemed to be "unrelated" to the suppression of free expression. 424 U.S. at 15-17.

[4] *See Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988); *Meyer v. Grant*, 486 U.S. 414 (1988); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[5] Findings, ¶ 11; *see also* S. Rep. 92, 102 Cong., 1st Sess. 59 (1991); H.R. Rep. No. 628, 102 Cong., 2d Sess. 64 (1992).

[6] J.S. App. 53a. Thus, this case presents the obverse of the situation presented to the Court last Term in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), where the government attempted to justify its regulations on the ground that certain

ming under federal licensing requirements "must, as a matter of law, include content of a type specified by the government" (J.S. App. 57a), the speech that the must carry law prefers is that over which the government exercises the most direct control. Under these circumstances, appellees' assertions that the Act's must carry requirements are content-neutral are demonstrably false.

2. The motions to affirm, particularly the government's, make no real attempt to defend the district court's analysis, only its conclusion. The thrust of the motions is that the must carry statute can be justified as an economic regulation of cable operators and that "salient features" of the cable industry, including a history of government regulation and physical scarcity in the marketplace, justify the government's intervention. The opposition filed by the other appellants forcefully refutes those arguments with respect to cable operators and to the industry viewed as a whole. But it is obvious that cable programmers in particular have not been the beneficiaries of any governmental largesse. In fact, appellees make no argument that either the federal government, or local governments for that matter, have granted any benefits to cable programmers or have regulated them in any fashion that could justify the First Amendment injuries must carry inflicts upon programmers.[7] Unlike broad-

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speech (commercial publications) were especially unworthy. Although the regulation manifested no discrimination against any particular viewpoint, the Court nevertheless found it impermissibly content-based. *Id.* at 1516-17.

[7] Certainly, for example, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), provides no support for the violations of cable *programmers'* rights. *See* Govt. Motion at 28; INTV Motion at 23; NAB Motion at 16-17. In any event, as Judge Williams explained below (J.S. App. 52a-53a), a more apt analogy to the must carry law would be a variation of the *PruneYard* pattern where the privilege of access was restricted "to persons living within four miles of each shopping center"—a restriction that would plainly be unconstitutional.

casters, cable programmers do not hold government broadcast licenses and cannot alternatively transmit their message free over the air. In effect, the must carry provisions resurrect a repudiated—and unconstitutional—federal policy of promoting broadcasters as "society's chosen" speakers[8] by burdening the First Amendment rights of competing providers of video programming.

3. Appellants do not, as NAB argues (NAB Motion at 12), concede that must carry survives *O'Brien* scrutiny. *See* J.S. at 24. The asserted governmental interests are not sufficiently substantiated to justify the far-reaching government intrusion into First Amendment protected activities. The must carry provisions Congress enacted are grossly overinclusive in view of their purported objectives. Even assuming that some operators have dropped or refused to carry particular broadcasters for truly anticompetitive reasons, the must carry provisions—divesting editorial discretion from *all* cable operators *as a class* for the benefit of *all* broadcasters *as a class* at the expense of *all* cable programmers *as a class*—are about the most blunt instruments imaginable for protecting against genuinely anticompetitive actions. Even Congress acknowledged that most broadcasters were carried prior to 1992. The must carry provisions thus represent a regulation of expression "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Thus, unless the deference to Congress the motions to affirm urge[9] extends to insulate congressional action from any evaluation by this Court, the district court's decision cannot withstand review even under *O'Brien*. As Judge Williams emphasized, "the legislative findings simply do not support the inferences needed to sustain must-carry" and "[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences." (J.S. App. 67a.)

[8] *Inquiry into Economic Relationship Between Television Broadcasting and Cable Television*, 71 FCC2d 632, 645-46 (1979); *see Quincy*, 768 F.2d at 1440-43.

[9] Govt. Motion at 18-19; NAB Motion at 13-14; PBC Motion at 18-19; INTV Motion at 12-13.

4. There is no basis to the government's claim that the must carry requirements "constitute a carefully designed mechanism specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as 'paramount'." Govt. Motion at 2, *citing Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). First of all, in contrast to previously invalidated must carry requirements, there is no mechanism in this scheme for viewer preferences whatsoever.[10] The structure of the must carry regime itself shows that Congress aimed to protect broadcasters, not to protect local broadcasting for viewers. Congress never attempted to establish, in connection with must carry or otherwise, a baseline of "localism" that should be protected in all circumstances—a touchstone for determining whether government intervention is truly necessary.[11] Instead, the must carry scheme operates as a function of the entirely fortuitous element of the capacity of the cable system.

But perhaps most revealing is the existence and effect of Section 6 of the 1992 Cable Act, the retransmission consent provision. The 1992 Cable Act gives commercial broadcasters the option of demanding either must carry carriage of their signals under Section 4 or payment for carriage of their signals under Section 6. A broadcaster that elects retransmission consent rights under Section 6

[10] In the FCC must carry regulations invalidated in *Century*, a minimum viewing standard was required of a station to qualify for must carry. 835 F.2d at 297.

[11] The *Quincy* court held that in the absence of such a baseline "we simply cannot know if rules are adequately tailored to pass constitutional muster." 768 F.2d at 146.

forfeits must carry protection; if the broadcaster and cable operator cannot agree on appropriate compensation, the operator is not permited to carry the broadcaster's signal.

The Solicitor General (Govt. Motion at 3 n.3) and NAB (NAB Motion at 13 n.21) both candidly acknowledge the bottom line effect of Congress' scheme. Only broadcasters whose programming is relatively unpopular may ultimately need to seek must carry protection. Broadcasters with significant audience appeal will be able to demand payment (in cash or in kind) from cable operators desirous of including their signals. In fact, broadcasters are leveraging their governmentally-granted rights under Section 6 to create yet another favored class of speakers, cable programmers affiliated with broadcasters, who will have the ability to obtain cable carriage before appellants or supplant them entirely.[12]

Thus, the statutory scheme actually empowers broadcast stations to override the asserted—and allegedly substantial—government interest in assuring public access to local broadcast programming by withholding the signal from the cable operator unless the broadcaster gets paid (or for any other reason). Instead of furthering the paramount First Amendment interests of viewers, as the government claims, Congress has enacted a scheme with two basic elements: (1) redistribution of wealth from cable operators to powerful broadcasters; and (2) a legislative preference for less popular local broadcasters who otherwise might fail in the competition for public attention in the marketplace, but who obtain carriage under the statute even though viewers might prefer to watch CNN, C-SPAN, USA Network, The Learning Channel or the other appellants represented here. The must carry statute is under any standard of review punitive, protectionist, unjustified and unconstitutional.

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[12] Both national broadcast networks like CBS, ABC, NBC, and Fox, as well as local broadcast stations, have begun to tie the grant of retransmission rights to an agreement by the cable operators to carry a new, broadcaster-created cable program network.

CONCLUSION

This Court should deny appellees' motions to affirm and note probable jurisdiction.

Respectfully submitted,

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